IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 157 of 1999
In
COMPANY PETITION No. 126 of 1990
with
COMPANY APPLICATION No. 191 of 1999
In
COMPANY PETITION No. 126 of 1990
with
COMPANY APPLICATION No. 292 to 296 of 1999
In
COMPANY PETITION No. 126 of 1990
with
COMPANY APPLICATION No.342 of 1999
In
COMPANY PETITION No. 126 of 1990
with
COMPANY APPLICATION No. 447 of 1999
with
COMPANY APPLICATION No. 454 of 1999
with
OJ CIVIL APPLICATION No. 205 of 1999
with
COMPANY APPLICATION No. 315 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STAR CHEMICALS (BOMBAY) LTD. - Applicant(s)

Versus

VITTA MAZDA LTD. & 1 - Respondent(s)

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Appearance :
MS DARSHANA S PANDIT for Applicant(s) : 1,
MR RM DESAI for Respondent(s) : 1,
NOTICE SERVED for Respondent(s) : 2,4 - 5, 9,
NOTICE UNSERVED for Respondent(s) : 3,6 - 8.
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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 24/11/2005

ORAL JUDGMENT

1.Since in all the applications the common question arises for consideration, they are being considered by this common order.

2.Company Application No.157 of 1999 is for validating 9 sale transactions entered into between the Company for the aggregate value of Rs.3,95,000/- against the decretal amount of Rs.17,20,000/- and such validation is prayed under Section 536(2) of the Companies Act, 1956 (hereinafter referred to as “the Act”). The applicant has also prayed for directing the Official Liquidator not to interfere with the possession of the property by the applicant. As per the applicant, the applicant had to recover the amount and the suit was filed being Summary Suit No.1698 of 1993 before the High Court of Bombay and in the said Suit a consent decree was passed on 27.6.1993. Based on the said consent decree, the applicant preferred execution

proceedings before the High Court of Bombay and it is the case of the applicant that in the said execution proceedings as per the precept, the 9 plots in question being Survey No.78 were attached by the Court and thereafter pending the said proceedings the company M/s.Vitta Mazda Limited (hereinafter referred to as “the Company in liquidation) agreed to execute the sale deed for the consideration of Rs.3,95,000/-. The Company is ordered to be wound up on 27.9.1998 by this Court in the proceedings of Company Petition No.126 of 1990 and No.212 of 1994. However, as per Section 441(2) of the Act, the order of winding up has the effect from the date of filing of the petition which would be 14.8.1990 in view of the proceedings of the Company Petition No.126 of 1990 and, therefore, the present applicant has preferred this application. It may also be recorded that the applicant has stated in the application that initially the applicant did file Company Petition No.49 of 1991 and No.58 of 1993 for winding up of the Company and as per the applicant, Company Petition No.49 of 1991 was admitted in the year 1991 and the order was also passed for advertisement in the Time of India and Gujarat Mitra. It is also stated by the applicant that pending the said proceedings, Company Application No.355 of 1993 was

preferred in Company Petition No.49 of 1991 by the applicant, restraining the Company from making any right issue of shares and further injunction from accepting money. However, with the consent of both the sides, as the parties were desirous to settle, the matter was adjourned to 19.5.1993. The aforesaid makes it clear that the applicant Company was aware about the proceedings of the winding up initiated by itself before this Court.

3. Company Application No.191 of 1999 is preferred for the relief to validate the transaction of sale of sub-plot No.126 of Final Plot No.78 admeasuring 4231.86 sq. ft. (394.14 sq., mtrs.) dated 30.11.1993 for the consideration of Rs.63,000/-. As per the application, the first applicant is a house-wife and the second applicant is the son of the first applicant, who is a practising Chartered Accountant at Mumbai.

4. Company Application No.292 of 1999 is for validation of the transaction entered into between the company in liquidation and the applicant for the aggregate value of Rs.4,20,000/- against the decretal amount of Rs.10,61,727/- and consequently the sale deed for the sale of the land of the Plots bearing Survey No.78/203, 78/226, 78/231, 78/227, 78/238, 78/225 and 78/239 of Village Katira, Nani Daman by the Company in

liquidation. As per the present applicant, the applicant was aware that the company application No.85 of 1989 was preferred for winding up of the Company and the applicant had also preferred application for substitution in place of the petitioners of the Company Petition No.85 of 1989 by preferring the Company Application No.26 of 1990 and as per the applicant, the Company Petition for winding up was admitted in the year 1992 and the orders were passed for advertisements. As per the applicant, the aforesaid proceedings Suit No.2273 of 1990 was filed before the High Court of Bombay and in the said Suit a settlement was arrived at and consent decree was passed and it is the case of the applicant that out of the said settlement properties of the Plots of the company are conveyed by registered sale deed in favour of the applicant.

5. Company Application No.293 of 1999 is preferred for validating the transaction entered into between the Company in liquidation and the applicant for a value of Rs.60,000/- against the decretal amount of Rs.10,61,727.58 in Suit No.2273 of 1990 and consequently for the sale of the property bearing Survey No.78/226 at Village Katira, Nani Daman. The applicant has also prayed for directing the Official

Liquidator to hand over the possession of the property to the applicant. The stand of the applicant is more or less at par with the applicant of Company Application No.292 of 1999.

6. Company Application No.294 of 1999 is preferred for validating the transaction entered into between the respondent Company and the applicant for Rs.60,000/- against the decretal amount of Rs.10,61,727.58 in Suit No.2273 of 1990 consequently for the Plot bearing Survey No.78 and the applicant has also prayed for directing the Official Liquidator to hand over the possession of the Plot bearing Survey No.78/227 at Village Katira, Nani Daman. The stand of the applicant is more or less at par with the applicant of Company Application No.292 of 1999.

7. Company Application No.295 of 1999 is preferred for validating the transaction of Rs.60,000/- between the Company and the applicant against the very decretal amount in Suit No.2273 of 1990 and consequently for the sale of the property bearing Survey No.78/231 at Village Katira, Nani Daman and the applicant has also prayed to direct the O.L., to hand over the possession of the Plot to the applicant. The stand of the applicant is more or less at par with the applicant of Company Application No.292 of 1999.

8. Company Application No.296 of 1999 is preferred for validating the transaction of Rs.60,000/- for the very decretal amount in Suit No.2273 of 1990 and consequently for conveying the property bearing Survey No.78/230 at Village Katira, Nani Daman and the applicant has also prayed for directing the Official Liquidator to hand over the possession of the plot to the applicant. The stand of the applicant herein is more or less at par with the applicant of Company Application No.292 of 1999.

9. Company Application No.342 of 1999 is preferred for validating the transaction entered into between the applicant and the Company in liquidation for Rs.60,000/- for the very decretal amount in Suit No.2273 of 1999 and consequently for the sale of the property bearing Survey No.78/225 at Village Katira, Nani Daman and the applicant has also prayed for directing the O.L., to hand over the possession of the plot in question to the applicant. The stand of the applicant is more or less at par with the applicant of Company Application No.292 of 1999.

10. Company Application No.315 of 2000 is preferred by the applicant for validation of the transaction of sale deed between the applicant and and the company in liquidation of sub-plot No.92 of Plot No.78 admeasuring

2421.36 sq., ft. (224.95 sq., mtr.) of Village Katira, Nani Daman and the applicant has consequently prayed for directing the O.L., to hand over the possession of the plot to the applicant. The first applicant is a house-wife and the second applicant is the husband of the first applicant and a practising Chartered Accountant at Mumbai. As per the applicant, on account of the winding up proceedings of Company Petition No.126 of 1990 and the order passed by this Court for winding up of the Company in liquidation and taking effect from the date of presentation of the petition being Company Petition No.48 of 1990, the present application is preferred for validation of the transaction.

11. Company Application No.447 of 1999 is preferred for validation of the transaction of the sale by the company in liquidation of the land admeasuring 332.46 sq., mtr., bearing Survey No.78, Block No.25 and the applicant has consequently prayed for declaration for the said property does not belong to the company in liquidation and the Sub-Registrar be directed to register the sale deed made between Shri Karsanbhai B. Tandel and the present applicant. The case of the applicant is that on account of the winding up proceedings taking effect from the year 1990, the

present petition is preferred for validation of the transaction and for relief prayed for in the application.

12.Company Application No.454 of 1999 is for the relief of validation of the transaction and for the declaration that the property bearing Survey No.78 peki Block No.46, admeasuring 3118 sq., mtrs., situated at Village Katira, Nani Daman is not the property of the company in liquidation and the basis in the application is that on 14.2.1992 the property was purchased by the applicant from the company in liquidation by registered sale deed and on account of the winding up proceedings taking effect from the year 1990 in the proceedings of Company Petition for winding up, the present petition is preferred.

13.Civil Application No.205 of 1999 is for joining as party by one Keshabhai Bhanabhai Tandel as petitioner No.2 as petitioner No.2 contending, inter alia, that the applicant has purchased the plot of Survey No.78, Block No.25, admeasuring 332.46 Sq. Mtrs., which is subject matter of Company Application No.447 of 1999 from the applicant therein and, therefore, he is affected by the litigation.

14.Heard Ms.Pandit and Ms.Mardavin, learned Counsel appearing for the concerned applicants of the concerned

applications and Mr.Desai, learned Counsel appearing for the Official Liquidator in all the applications and as such though in some of the applications, the Company in liquidation earlier came to be represented through another Advocate, but as on account of winding up, the Official Liquidator has stepped into the shoes of the Company in liquidation, he is directly affected party and Mr.Desai has represented on behalf of the Official Liquidator for representing the interest of the company in liquidation.

15.Section 536(2) of the Act, which is relevant for the present petition, reads as under:

> **"S.536(2) Avoidance of transfers, etc., after commencement of winding-up**:
>
> In the case of a winding up by [the Tribunal], any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up shall, [unless the Tribunal] otherwise orders, be void."

16.Therefore, if after the commencement of the proceedings of winding up if disposition of the property of the company has taken place, then unless

the same is otherwise ordered by this Court, such disposition would be void. There is no dispute on the commencement of the proceedings of the winding up in the year 1990 on account of the winding up order being passed by this Court in Company Petition No.126 of 1990. Hence, the intention of the legislature under Section 536(2) appears to see that no transaction after the commencement of the proceedings of winding up are given lawful effect unless it is otherwise so declared by the Company Court. The major purpose appears to be that once the winding up proceedings having been commenced no preferential payment be permitted by the company, which is facing the winding up proceedings, nor the company who is facing the winding up proceedings may enter into a transaction which may result into giving voluntary preference to any of its creditors which may otherwise not be illegally permissible. Since Section 536(2) of the Act leaves room to the Company Court for declaration of the transaction as valid or legal, it cannot be said that all transactions would be void, but it can rather be said that unless the transaction is declared valid, all transactions would be void. Therefore, declaration of validity of the transaction is to be read as an exceptional category to the normal rule and such

declaration may fall only if it is established to the fullest satisfaction of the Company Court that the transaction is genuine, bonafide and is not with a view to frustrate the rights of the other creditors. The Company Court while undertaking the exercise for declaring the transaction as valid in normal circumstances would give more weightage to the bonafide of the party who has secured interest by such transaction and whether such bonafide or the transaction is without prior notice of the proceedings of winding up or not would be one of the major crucial tests. So far as the company in liquidation is concerned, once the proceedings of winding up are initiated it can hardly be denied by them that they were not aware of the proceedings of winding up. Therefore, it would be for the party asserting the right as bonafide purchaser or beneficiary of bonafide transaction to assert and establish that since the transaction is bonafide, the same cannot be invalid or rather would be valid to protect his right. Such validation can rather be said as for protecting the equitable interest of the parties. The burden of establishing that the transaction is bonafide would be upon the party who asserts for validation of the transaction. If such burden is not satisfactorily

discharged, the Court may decline the declaration for validation of transaction. The reference may be made to the decision of this Court in case of **"Siddhpur Mills Company Ltd.", reported in 1987 (61) Company Cases, 756** observing that the Court can validate such impugned transactions in those bonafide cases which demand protection of equitable considerations.

17.Ms.Pandit, learned Counsel appearing for some of the applicants relied upon th decision of Calcutta High Court in the case of **"J.Sen Gupta (Private) Limited", reported in 32 Company Cases,** 876 and contended that this Court has an absolute discretion to validate the transaction of the Companies' Assets made after the commencement of winding up process and while exercising the discretion the Court can validate even the transactions which are not entered into in ordinary course of business. If this Court finds that the transaction was for the benefits of all interested of the company, such transaction may be validated by the Court even if it was not made in the ordinary course of business in the company. Ms.Pandit contended that, therefore, if this test is applied as the company was facing proceedings of execution and if the properties are conveyed pending execution proceedings such transactions deserve to be declared as bonafide or this

Court may validate such transaction as the transaction can be said as in the interest of the company. For supporting her contention she also relied upon the decision of this Court in case of **Commercial Ahmedabad Mills Co. Ltd.", reported in 1986 (60) Company cases, 717** for contending that if the transaction is entered into in normal course of business so that with the help of the borrowing, the company would restart its mill, then such transaction can be said as bonafide transaction entered into by the company.

18. In order to appreciate the contention, the reference can be made to the decision of Bombay High court in case of **"Provisional Liquidator, The Godavari Sugars & Refineries Ltd.**", 1954 (24) Company Cases, 149, whereby view taken is that the Court should bear in mind the fundamental principle that the assets of the company should be made available for the distribution on pari passu amongst the creditors of the Company and no creditor should obtain an advantage over the fellow creditors.

The reference may also be made to the another decision of Bombay High Court in case of "**Monark Enterprises v. Kishan Tulpule and Ors.", reported in 1992(74) Company Cases, 89**.

19. It may be recorded that in case of one of the

beneficiaries of the transaction by the company in liquidation of Shri Aspi F. Langrana, who is the financial consultant at Mumbai, this Court (Coram: R.R.Tripathi, J.) in Company Application No.213 of 2000 in Company Petition No.126 of 1990, while examining the aspects for validation of the transaction for purchase of the two plots bearing Survey No.14 and 23 situated at the very village Kathiria Nani Daman at paragraphs 17 and 18 observed as under:

> *“17. After hearing both the sides and taking into consideration, the submissions made by all the parties, it is crystal clear that the documents which are produced by the petitioner did not inspire any confidence, more particularly, because the agreement for sale is executed at Bombay on 14th September, 1993 and at that time, in Clause-3, it is stated that, "...Meanwhile, the Purchasers are entitle to use, occupy and possess the said property and the Vendors herein have granted licence to the Purchasers for the same."*
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> *18. The certificate produced by the Chartered Accountant at page 63 depicts that amount of Rs.70,000=00 each, totaling to*

Rs. 1,40,000=00, was paid in cash. The Court is not going into the aspect of validity of such transaction which may be held to be invalid on the ground of the amount being paid in cash, for the present, the Court is not to pronounce on the validity of that transaction. The Court is only considering as to whether on assumption that the transaction is true, the Court should grant reliefs as prayed for by the petitioners. In view of the fact that the transaction is subsequent in point of time to the service of notice as stated by Smt. N.J. Patel, Tax Recovery Officer, Valsad, in her affidavit, paragraph 2, and in view of the fact that an order under Section 281(1) is already passed, which is not challenged by filing an appropriate proceeding, and in view of the fact that 'statement of affairs' is not filed by Ex.Directors of the company and 'books of accounts' are not made available, any relief(s) as prayed for can be granted. The answer is 'no'. In the result, this application must fail."

20.Mr.Desai, learned Counsel appearing for the OL heavily relied upon the aforesaid decision and raised the

contention that property of the Company in liquidation was under the attachment of the Income Tax Authority in the year 1993 and, therefore, he submitted that if the properties were under the attachment of the Income Tax Authority the transaction could not have been entered into and in his submission the application may be dismissed by this Court since the transaction results into ex-facie illegality since transfer of the property which was under the attachment of the Income Tax Department. He additionally submitted that there was also attachment by the Government Authority for recovery of the revenue dues and, therefore, he submitted that as the action of the Ex-Directors of the Company in liquidation was ex-facie in contravention to the statutory provisions as the transfer was barred, this Court may declare the transaction as invalid or may not validate the transaction as prayed for in the application.

21. It appears that the attachment by the Government Authority or may be by the Income Tax Authority is one of the relevant circumstances which this Court may consider for invalidation of the transaction, since as per law once there is an order of attachment by competent authority, the rights of the owner in the property stands attached and legally the property

cannot be conveyed in favour of any party. However, such situation does not absolutely take care of the interest of the bonafide purchaser, who may have been duped by the Ex-Directors of the Company, who by non-disclosure of the relevant order of attachment and/or order might transfer the property of the company during the pendency of winding up petition.

22. Therefore, while exercising power under Section 536(2) of the Act, the matter can be broadly summarised as under:

(1) In normal circumstances, the transactions entered into after the commencement of the proceedings of winding up are void unless and otherwise declared by the Company Court as valid.

(2) The validation of the transaction by the Court would be only in exceptional category and on equitable and just considerations.

(3) The transactions entered into in ordinary course of business by the Company for running day-to-day business may stand excluded from the purview of Section 536(2) of the Act and Section 536(2) of the Act would apply to the transactions entered into by the company otherwise than for running its day-to-day business of the company.

(4) The burden of proving that the transaction is

bonafide would be upon the beneficiary of the transaction

(5) The Court may at the time when transaction is to be considered for its validation, examine the aspects as to whether such transaction was for conferring additional benefits to the properties of the Company or not.

(6) If the Court is satisfied on equitable consideration that the transaction is fully bonafide without notice of the proceedings of winding up, the Court normally would declare such transaction as valid.

(7) If the transaction is in breach of any prohibitory order of the competent authority or there were prohibitions against the transfer of the property of the company, then also while declaring the validity of the transaction, the Court may provide for the suitable conditions to make loss good in case the Court is satisfied that the purchaser entered into transaction in bonafide. As the whole exercise of the power is on just and equitable consideration, the Court may also put the company in liquidation to fulfill suitable conditions even if the transaction is to be treated as invalid.

23.If the matter is examined in light of the aforesaid principles, it appears that so far as the applicant of Application No.157 of 1999 is concerned, it was fully aware about the proceedings of winding up and not only that but the company itself had also preferred the winding up proceedings. The applicant company is also governed by the provisions of the Act and, therefore, it is difficult to conclude that the applicant Company would not be aware about the consequence of the pending winding up proceedings. The ground as sought to be canvassed of the suit before the Bombay High Court and the consent decree and the execution proceedings, if considered as it is, then also all such proceedings were without leave of the Company Court, nor any material is placed before this Court to establish that the aspects regarding the pendency of the proceedings of winding up were brought to the notice of the Court concerned. Such transaction can at the most be said as voluntary action by the Ex-Directors of the Company in liquidation and the applicant being fully aware of the pendency of the winding up proceedings, cannot contend that the transaction is bonafide and even if such contention is raised, the same holds no water.

24.The only aspects which may deserve consideration by this Court is as to whether the transaction was entered

into in regular course of business of not. It appears that as per the Memorandum of Association and Articles of Association of the Company, the Company was established for dealing in higher purchase of machineries. However, in the annual Report of the Company for the year 1990-91, copy whereof is made available by Ms.Pandit, learned Counsel for some of the applicants, it has been stated at Clause-4 as under:

> “The Company has also undertaken simultaneously property development activity for the year under review and this operation commences from 1990. However, full potential of the business has not yet been realised, though the beginning has been made and the activity has yielded a marginal return and has made a reasonable contribution towards profitability.”

(FURTHER ORDER ON 21.12.2005)

25. Therefore, in view of the aforesaid decision it can be said that the Company was dealing in business of development of property since 1990, but there is no sufficient material produced on record to show the date on which the property came to be purchased by the Company which in turn sold to the applicant herein. As

observed earlier the burden is upon the purchaser of the property to establish that the transaction is bonafide and deserves to be declared as valid in view of the equitable consideration. Such burden appears to have been not properly discharged by the applicant in the present proceedings. Therefore, it is difficult to conclude that the transaction in question is on day-to-day business of the Company in liquidation.

26.The perusal of one of the Sale Deeds for the portion of the property is purchased and referred in the proceedings of Company Application No.454 of 1999 executed in favour of Mr.Keshabhai Bhanabhai Tandel, shows that even in the said Sale Deed there is no recital of the date on which the company in liquidation had purchased property, but it only refers that the non-agricultural permission to be granted on 23.6.1988 and the same came to be renewed vide letter dated 12.8.1991 of the Collector for the period up to 22.6.1992. Therefore, even if the period is considered as that of 1988 for holding of the property by the Company, the same is prior to the decision of the Company in liquidation for dealing in business for development of property and, therefore also it cannot be concluded that the property was purchased by the Company for its regular business.

27.If the other aspect is examined on the question of the transaction being barred by the other laws since the property in question was already attached by the Income Tax Authority as well as the Revenue Recovery Officer, it appears that had the Company in liquidation consciously transferred the property in spite of the order of attachment of the competent Authority to the purchaser, possibly the purchaser cannot be faulted with or at least it cannot be said that the transaction is not bonafide so far as it relates to the purchaser, but it may be malafide or not valid for the Company in liquidation. Under such circumstances, as observed earlier, even if the transaction is set at naught or not declared as valid, this Court may put the property of the Company in liquidation on condition before declaring the transaction as valid or otherwise, and the consequence may be for declaration of the transaction as invalid upon suitable conditions this Court may find it proper to consider the facts and circumstances of the case. It appears that the same time that even while imposing such conditions, the Court may take care of not creating a situation, whereby any creditor is given preference in comparison to other creditors similarly situated.

28.Therefore, it appears that the applicant of Company

Application No.157 of 1999 would not be entitled to the relief of declaring the transaction as valid, since the company had the knowledge of the proceedings and the claim of the applicant of Company Application No.157 of 1999 is at par with the other creditors of the Company as then in existence. Even if the transaction is treated as not valid, then also the applicant of Company Application No.157 of 1999 would not be entitled to the condition of depositing the amount of sale consideration which is referred to in the sale deed, but would only be entitled to the amount of sale consideration at par with the other creditors of the Company in liquidation. Hence, while rejecting the prayer of the applicant of Company Application No.157 of 1999 for declaring the transaction as invalid, it is directed that the Official Liquidator shall consider the claim of the applicant of Rs.3,95,000/- which is stated in the sale deed in accordance with the statutory priority as per the Act.

29.Similar will be the final order for the applicants of Company Applications No.191 of 1999, No.292 of 1999, No.293 of 1999, No.294 of 1999, No.295 of 1999, No.296 of 1999 and No.342 of 1999 and hence all the concerned transactions are declared invalid with the further directions that the amount mentioned in the sale deed

shall be treated by the Official Liquidator as the amount outstanding of the Company in liquidation to the applicants of the concerned applications and shall be considered in accordance with the statutory priority as and when the question arises for distribution of the payment amongst the creditors.

30.The Civil Application No.205 of 1990 for joining Mr.Keshabhai Bhanabhai Tandel as petitioner No.2 in Company Application No.447 of 1999, considering the facts and circumstances that he has purchased the plot of Survey No.78, which is the subject matter of Company Application No.447 of 1999, deserves to be granted and hence ordered accordingly.

31.The applicants of Company Applications No.315 of 2000, No.447 of 1999, and No.454 of 1999 relate to the transaction entered into by the persons with the Company in liquidation, who cannot be attributed to the knowledge of winding up proceedings, nor can it be held that the transactions were entered into by the Applications concerned in their favour for frustrating the effect of the winding up order passed by this Court of the company in liquidation. However, the transactions were prohibited on account of the attachment order and, therefore, Company was prohibited to transfer the property in question. At the same

time, if the transactions are declared invalid, it may result into putting the concerned purchaser who are concerned applicants in the respective applications at loss for no fault on their part. Therefore, equitable consideration does demand that even if the transaction is declared invalid, the Court may impose suitable conditions to be complied with by the Official Liquidator representing the company in liquidation. The reference may be made to the decision of this Court in case of **"Bank of Baroda v. O.L of Astron Drugs & Indus. Ltd." in Company Application No.254 of 2003**, wherein at para 10, it was observed thus:

> "10. *Therefore, it appears that Respondent No.5 has the basis for claiming the status as bonafide purchaser of the property but thereby the rights of the Bank as a mortgagee over the property cannot be allowed to be frustrated creating the situation that the Bank would not be in a position to recover any amount from the property which is purchased by respondent No.5. The interest is created in favour of the mortgagee and even if Respondent No.5 has purchased the property, the same will be with the security interest of the secured creditors. In normal circumstances, when any person has purchased the property, which is mortgaged to any secured creditor, the secured*

creditor may be in a position to enforce the security interest. However, since that stage has up till now not reached, it may not be necessary to examine the said aspect in detail but at the same time the action of Respondent No.5 appears to be prima facie bonafide and, therefore, even if the provisions of Section 536(2) are to be considered and to be enforced, at the instance of the applicant Bank, a situation cannot be created which results into putting respondent No.5 at peril without there being any fault on his part consequently resulting into loss for payment of the amount and incurring of the expenses for purchase of the property etc. It also appears to some extent the applicant Bank has not resorted to appropriate remedy well in time. Therefore, considering the facts and circumstances, even if this Court is to consider the matter for declaration of the sale as invalid, it would be for the applicant Bank to compensate Respondent No.5 by paying the consideration and other expenses which have been incurred by respondent No.5 and also a reasonable interest at the rate of 12% per annum from the date of parting with the money till the actual refund. I am inclined to take such view because out of the total area of

the property admeasuring 17604 sq., mtrs., the portion over which the factory was situated and adjacent area, is of 6164 sq., mtrs., which has been sold to Respondent No.5 and, therefore, if the said area is excluded of the factory premises and the land below the same, it may not be possible for the secured creditors or O.L., as to case may be, to realize the dues in the best possible manner. If the properties are to be sold out right in the process of winding up even while realizing the interest of the secured creditors, it would be more convenient if the whole property including the area admeasuring 6164 sq., mtrs., over which the factory is situated is sold. The same would on the contrary enable the secured creditors to realize the maximum money from the properties of the Company as against the amount to be paid to respondent No.5 for refund and for compensating the other losses as referred to herein above."

32. Therefore, I find that while declaring the transaction as invalid, the condition must be provided to refund the amount of sale consideration to the purchaser, who is applicant of the concerned Company Application and also the reasonable interest at the rate of 12% per annum from the date of the transaction till the actual

payment. Therefore, Company Applications No.315 of 2000, No.447 of 1999 and No.454 of 1999 are disposed of with the observations and directions that the transactions in question are declared invalid on condition that the amount of sale consideration mentioned in the sale deed with the interest at the rate of 12% per annum from the date of sale deed till actual payment shall be paid by the Official Liquidator to the concerned applicants of the concerned Company Applications, before the final sale deed is executed by the Official Liquidator.

It is further clarified that the Official Liquidator may move the Company Court for disposal of such property. However, before the sale deed is executed by the Official Liquidator in favour of the purchaser whose sale may be confirmed by this Court, it would be required for the O.L., to pay the aforesaid amount of principal together with interest to the concerned applicant of the concerned Company Applications including substituted applicant of Civil Application No.205 of 1999 with Company Application No.447 of 1999 and thereafter only the sale deed will be executed.

33. In view of the above, Company Applications No.315 of 2000, No.447 of 1999 and No.454 of 1999 shall stand allowed only to the aforesaid extent. Considering the

facts and circumstances, there shall be no order as to costs.

21.12.2005 **(Jayant Patel, J.)**

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